Supreme Court, U.S.
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No. 87-1834

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JAMES O. PEARSON,
Petitioner

v.

STATE OF LOUISIANA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTION PRESENTED

Whether the Louisiana Vehicular Homicide Statute may be constitutionally interpreted so as to allow the essential elements of criminal conduct to be established without a showing of proof, beyond a reasonable doubt, that the blood alcohol content of the operator of a motor vehicle proximately caused the death of the victim.

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JAMES O. PEARSON,

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v.

STATE OF LOUISIANA,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The petition of James O. Pearson respectfully requests that a Writ of Certiorari issue herein to review the Judgment and Order of the Supreme Court of the State of Louisiana rendered in these proceedings on February 12, 1988, which declined to review the September 23, 1987 Judgment and Opinion of the Louisiana Court of Appeal for the Second Circuit, (rehearing denied October 22, 1987), which affirmed Petitioner's criminal conviction and sentence.

OPINION BELOW

The Judgment and Order of the Supreme Court of the State of Louisiana concerned herein is cited as *State v. Pearson*, —— So.2d ——, (L.A. 1988), unreported as of this date, Number 87-K-2536, February 12, 1988, appended hereto as Appendix "A", page 1a herein.

OTHER RELEVANT ACTIONS AND OPINIONS BELOW

(1) Judgment and Opinion of the Louisiana Court of Appeal for the Second Circuit, dated September 23, 1987, rehearing denied October 22, 1987, affirming Petitioner's criminal conviction and sentence, reported as *State v. Pearson*, 513 So.2d 459, (LA. App. 2nd Cir. 1987), see Appendix "B", page 2a herein.

STATEMENT OF JURISDICTION

Following Petitioner's conviction of Vehicular Homicide on July 25, 1986, the Louisiana Court of Appeal for the Second Circuit affirmed Petitioner's criminal conviction and sentence on September 23, 1987. *State v. Pearson*, 513 So.2d 459 (LA. App. 2nd Cir. 1987). Rehearing was denied on October 22, 1987. The Honorable Supreme Court of the State of Louisiana denied Certiorari on February 12, 1988. This Judgment and Order represents the decision sought to be reviewed herein.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 2101(d); 28 U.S.C. § 1257(3), (a ground for Certiorari is found to exist where any "right, privilege, or immunity is specially set up or claimed under the constitution . . ."; and, rule 17.1(c) of the rules of this court, (a ground for Certiorari is found when "a state court . . . has decided a federal question in a way in conflict with applicable decisions of this court.").

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

> when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides:

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Louisiana Revised Statute 14:32.1, the Vehicular Homicide Statute, provides:

> A. Vehicular homicide is the killing of a human being caused proximately or caused directly by an offender engaged in the operation of, or in actual physical control of, any motor vehicle, aircraft, vessel, or other means of conveyance whether or not the offender had the intent to cause death or great bodily harm whenever any of the following conditions exist:
>
> (1) The offender is under the influence of alcoholic beverages as determined by chemical tests administered under the provisions of R.S. 32:662.
>
> (2) The offender's blood alcohol concentration is 0.10 percent or more by weight based upon grams of alcohol per one hundred cubic centimeters of blood.
>
> (3) The offender is under the influence of narcotic drugs, central nervous system stimulants, hallucinogenic drugs, methaqualone, or barbiturates and such condition was a contributing factor to the killing.

> B. Whoever commits the crime of vehicular homicide shall be fined not less than two thousand dollars nor more than five thousand dollars and shall be imprisoned with or without hard labor for not less than two years nor more than five years.

Louisiana Revised Statute 14:32, the Negligent Homicide Statute, provides:

> Negligent homicide is the killing of a human being by criminal negligence.
>
> The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence.
>
> Whoever commits the crime of negligent homicide shall be imprisoned with or without hard labor for not more than five years, fined not more than five thousand dollars, or both.

Louisiana Revised Statute 14:12, which defines criminal negligence, provides:

> Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumtancess.

STATEMENT OF CASE

A. Procedural History

Petitioner James O. Pearson was involved in an alcohol-related traffic accident on September 20, 1983. Petitioner was charged by way of bill of information with Vehicular Homicide, as defined by Louisiana Revised Statute 14:32.1. On July 25, 1984 Petitioner was found guilty of the charged offense of Vehicular Homicide by a six person jury. Petitioner was subsequently sentenced to serve thirty (30) months imprisonment at hard labor in the custody of the Louisiana Department of Corrections.

A direct criminal appeal taken to the Louisiana Court of Appeal for the Second Circuit pursuant to Article I, Section 19 of the Louisiana Constitution of 1974, and Article 911, *et seq.* of the Louisiana Code of Criminal Procedure. Petitioner's Judgment of Conviction and Sentence were affirmed on September 23, 1987. *State v. Pearson*, 513 So.2d 459 (LA. App. 2nd Cir. 1987). Rehearing was denied on October 22, 1987. *Id.* On February 12, 1988 the Honorable Supreme Court of the State of Louisiana denied Certiorari. *State v. Pearson*, Number 87-K-2536, February 12, 1988.

B. Factual History

In order to facilitate review of the very narrow question presented as the basis of this Writ application, Petitioner will simplify the facts, and adopt the opinion of the Louisiana Court of Appeal for the Second Circuit, with the following observations:

(1) Defendant was lawfully intoxicated on the night of the incident in question.

(2) The victim was lawfully intoxicated on the night of the incident in question.

(3) Defendant has denied that he was operating the motor vehicle involved in the accident in question.

(4) For purposes of this Writ Application, this Court may assume that defendant was in fact driving the vehicle involved in the accident in question.

(5) The victim agreed to ride in a vehicle driven by an intoxicated driver.

(6) The victim died as a result of injuries sustained in the accident in question.

REASONS FOR GRANTING WRIT

This Honorable Court should and ought to grant a Writ of Certiorari to the Honorable Supreme Court of the State of Louisiana because:

(1) The Louisiana Vehicular Homicide Statute, on its face, and as applied to Petitioner in the instant case, is unconstitutional to the extent it allows Petitioner to stand convicted of a felony offense, without a showing by the State that the blood alcohol content of the operator of a motor vehicle caused the death of the victim.

ARGUMENT

In *State v. Taylor*, 463 So.2d 1275 (LA. 1985) the Supreme Court of Louisiana, as per Mr. Justice Dennis, provided that "The vehicular homicide statute should be construed to require proof of a causal relationship between an operator's unlawful blood alcohol concentration and the death of a victim in order to convict." 463 So.2d at 1275. This rule of construction is essential in order for the questioned statute to survive constitutional attack.

Petitioner construes this language to mean that the State should have proven the existence of four essential facts beyond a reasonable doubt in order to obtain constitutionally valid judgment of conviction. The essential facts, given the particular circumstances of this case, as perceived by Petitioner are: (1) that the Petitioner was legally intoxicated; (2) that Petitioner operated the motor vehicle involved in the accident; (3) that the victim died as a result of injuries sustained in the accident; and, (4) that the death of the victim was proximately caused *by the defendant's blood alcohol concentration.* For the sake of argument, Petitioner will concede that the first three facts are proven.

The connection between Petitioner's intoxication and the victim's death is not sufficiently proven. The State has attempted to jump from blood alcohol content to the death of the victim to establish the ultimate conclusion that the death was caused by the alcohol content. This approach is the equivalent to a presumption of causation; that is, that because Petitioner was driving while intoxicated and the victim is dead, it is presumed that said

intoxication caused the victim's death in the absence of any evidence to the contrary. This approach is akin to a "but-for" analysis; that is, "but for" Petitioner's intoxication, the victim would not have died. The "but-for" test is not sufficient to establish causation in an ordinary civil proceeding and certainly may not meet the causal link in the context of a criminal proceeding.

The crux of the problem is language in the *Taylor* opinion which appears to be somewhat contrary to the previously cited language. The language perceived to create the problem is as follows:

> "At the common law, criminal liability for a killing attached in the following situation: (1) a killing caused by an act committed with the intent to kill or cause bodily harm which is not excused or justified by other principles of law; (2) a killing caused by criminal negligence, regardless of the actor's intent' (3) *an accident or unintended killing caused by an unlawful act.* There could be no conviction for homicide without proof of a causal link between the killing and actor's culpable conduct. Vehicular homicide fits neatly within the third category above *if the driver's intoxication impaired driving (the unlawful act)* must cause the death; if not, the crime would be an aberration from common law principles." (emphasis added), (citations omitted).

Petitioner's question is whether his intoxication, as opposed to his operation of the vehicle while intoxicated, must be shown to be the proximate cause of the victim's death. If Petitioner is correct in his perception that his *intoxication* must be shown to be the lawful proximate cause of the victim's death, it would appear that Petitioner is equally correct in his contention that the State has failed to sustain its burden of proof beyond a reasonable doubt with regard to the element of causation.

If Petitioner is incorrect in his perception, it would appear that *Taylor* may be taken to stand for the propo-

sition that causation is satisfied so long as the unlawful act (driving while intoxicated) is connected with the death of the victim. This interpretation would appear to blur vehicular homicide with negligent homicide. Vehicular homicide requires causation. Negligent homicide only requires a showing of a killing by way of criminal negligence. Criminal negligence may be proven by the showing of the violation of a statue or ordinance. Driving while intoxicated, without a showing of more, amounts to a violation of the law sufficient to trigger application of the Negligent Homicide Statute. What this appears to mean is that the State does not have to prove causation when the intoxicated driving somehow results in an accidental or unintended killing.

The vehicular homicide and negligent homicide statutes are not interchangeable. The State elected to prosecute for vehicular homicide, and not negligent homicide. Even if the evidence shows that defendant could have been convicted of negligent homicide, it does not mean that he could have been convicted of vehicular homicide. The bottom line of this argument is that the evidence contained within the record is insufficient to sustain the conviction for *vehicular homicide.* The evidence would only withstand a constitutional attack on grounds of sufficiency *if* defendant had been indicted for negligent homicide, or could have been lawfully indicted for *vehicular homicide and/or negligent homicide!*

Justice Calogero apparently perceived this problem in his concurring opinion in *Tayor*, wherein he stated: "If the majority is stating that the crime of vehicular homicide is proved simply upon showing that .10 or better alcohol content combined with simple operation of a motor vehicle have caused the death of a human being, I suggest that such interpretation is either ambiguous or wrong." Additionally, Justice Calogero added the following language, which is insightful: "In my view *a required additional element must surely be a showing that*

the .10 or better blood alcohol content has caused, or been accompanied by, substandard operation of the vehicle. Otherwise I cannot quite understand how the .10 or better blood alcohol content in defendant can cause the death of a victim." 463 So.2d at 1276, (emphasis added).

Undersigned counsel are incapable of articulating their client's position as effectively as Justice Calogero has stated it. It is respectfully urged that certiorari be granted in order to adequately address and answer the question posed by Justice Calogero's perceptive concurring opinion in *Taylor*.

Wherefore, Petitioner James O. Pearson respectfully requests that a Writ of Certiorari issue herein to review the adverse order of the Supreme Court of the State of Louisiana.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE SUPREME COURT
OF THE STATE OF LOUISIANA

No. 87-K-2536

STATE OF LOUISIANA

vs.

JAMES O. PEARSON

IN RE: Pearson, James O.; Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 18925-KA; Parish of Morehouse 4th Judicial District Court Div. "C" Number 85-2533A

February 12, 1988

Denied.

JLD
JAD
PFC
JCW
LFC

Supreme Court of Louisiana

February 12, 1988

/s/ [Illegible]
Clerk of Court
For the Court

APPENDIX B

COURT OF APPEAL OF LOUISIANA
SECOND CIRCUIT

No. 18925-KA

STATE OF LOUISIANA,

Appellee,

v.

JAMES O. PEARSON,

Appellant.

Sept. 23, 1987

Rehearing Denied Oct. 22, 1987

Kidd and Kidd by Paul Henry Kidd, Monroe, for appellant.

William J. Guste, Jr., Atty. Gen., William B. Faust, III, Asst. Atty. Gen., Baton Rouge, James A. Norris, Jr., Dist. Atty., West Monroe, John P. Spires, Asst. Dist. Atty., Bastrop, for appellee.

Before SEXTON, NORRIS and LINDSAY, JJ.

SEXTON, Judge.

The defendant, James O. Pearson, was convicted by a jury of the crime of vehicular homicide. He was sentenced to thirty (30) months at hard labor and now appeals his conviction and sentence asserting three specifications of error which he contends warrant the reversal of the conviction and sentence. Finding no merits to any of defendant's contentions, we affirm the conviction.

FACTS

James Pearson and Fred Farrar, the decedent, engaged in a series of bar hopping in the Monroe area on the evening of September 20, 1983. The parties traveled back and forth between the American Legion Hall and a bar known as Betty Lou's. During this time, both parties engaged in heavy drinking. As they left the American Legion Hall for the last time, Mr. Farrar began driving the Pearson pickup, apparently because one of their eventual destinations was the home of Farrar's girlfriend and Farrar did not wish to be seen visiting in his own vehicle.

Proceeding from the American Legion Hall, the two ended up at Betty Lou's. During their stay at this bar, Mr. Farrar was seen holding a set of keys which were not identified. Ricky DeBlieux, a former girlfriend of Mr. Pearson, witnessed the two parties leave the bar and enter Mr. Pearon's pickup truck. She observed Farrar get into the driver's side. She did not, however, see the parties drive off as she had reentered the bar by that time. Farrar and Pearson then headed south on Highway 165 toward the parking lot of the Stockade Lounge with the intention of obtaining gasoline for the truck and then heading toward Rayville to see Farrar's girlfriend. As the parties made a left turn across the opposite lane to enter the Stockade Lounge's parking lot, they collided with a northbound tractor trailer unit towing a pickup truck. The tractor unit came to rest on its side pointed southward, while the pickup truck came to rest upside down between the tractor cab and the towed pickup truck which had broken loose. The defendant suffered major injuries including a broken collar bone. Mr. Farrar suffered massive injuries that resulted in his death. Blood tests taken of the two men demonstrated that defendant had a blood alcohol content of .14 percent and the deceased .19 percent. Defendant was charged by bill of information with vehicular homicide and was found

guilty by a jury and sentenced to thiry months at hard labor.

ASSIGNMENT OF ERROR NO. 1

Defendant claims by this assignment of error that the evidence adduced at his trial was legally insufficient to sustain his conviction for vehicular homicide. Specifically, he argues that the state's evidence did not exclude the reasonable possibility that Mr. Fararr was the driver of the truck.

Under the standard of review enunciated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the proper standard of appellate review for a sufficiency of evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.

The *Jackson* standard is applicable in cases involving both direct and circumstantial evidence. An appellate court reviewing the sufficiency of evidence in such cases must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and inferred from the circumstances established by that evidence must be sufficient for a rational trier of fact to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *State v. Sutton*, 436 So.2d 471 (La.1983).

The defendant argues that a reasonable hypothesis has not been excluded by the evidence presented. Specifically, he argues that the hypothesis that someone other than he was driving the truck is reasonable. He testified at trial that Mr. Farrar was in fact driving the truck at the time of the incident. He additionally asserts that his theory is supported by the stipulated testimony of Ricky

DeBlieux that she observed Mr. Farrar entered the truck after the two had exited Betty Lou's Lounge. Additionally, defendant points to testimony that Mr. Farrar had been seen with keys in his hand while sitting at the bar in the lounge. Moreover, defendant asserts that the testimony of his expert witness as to motion dynamics and the movement of objects resolves the issue of the location of the parties in the truck.

Although Mr. Pearson was found pinned under the steering wheel, he argues that the accident consisted of two separate impacts such that the person in the driving position would have been knocked past the person in the passenger's position during the course of the collision. Lastly, defendant seeks to discredit the testimony of the state's experts by pointing out that their calculations and conclusions were not based upon a secondary impact or rollover.

The jury obviously rejected these contentions. We find the jury's rejection of the defendant's arguments reasonable in light of the record evidence.

The only eye witnesses to the accident were the defendant, the deceased, and the two occupants of the tractor-trailer unit. Neither of the latter pair, however, saw the position of the occupants of the pickup.

The defendant was found pinned under the steering wheel of the vehicle with the deceased to his right lodged between the seat and the back windshield.

Additionally, three separate people heard the defendant admit to being the driver. DeWanna Little, the niece of Mr. Farrar, testified she specifically asked Mr. Pearson who was driving and that he admitted to the fact. While ambulance driver Ben Watson and Trooper McGrew disagreed as to the exact words used by the defendant, both agreed that the defendant was unequivocal in his admission that he was the driver even though they acknowl-

edged that the defendant was obviously in pain at the time.

Finally, although defendant attempted by way of expert testimony to demonstrate that Mr. Farrar was the driver, the greater and more convincing evidence reveals otherwise. The testimony of Ray Herd, an expert in accident reconstruction, demonstrates that the left front of the tractor collided with the right front fender of the pickup. Dr. P.G. Grodman, the forensic pathologist who performed the autopsy on Mr. Farrar, testified that the type of injuries sustained by the victim, as well as the defendant, were consistent with the type of accident that occurred. On cross-examination he did agree that the injuries were not inconsistent with Mr. Farrar being the driver; however, he noted that this theory would be difficult to relate to his appreciation of how the accident occurred.

Although Dr. Arthur Bruce, the defendant's expert in mechanical engineering, testified that in his opinion there was a secondary major impact on the vehicle (a conclusion which may support a theory that Farrar was the driver of the vehicle), he was not qualified as an expert in accident reconstruction. Notably, he corroborated the testimony of Ray Herd in his conclusions that the initial impact was to the right fender of the pickup. He was, however, unable to shed any light on the position of the parties in the vehicle at the time of the accident.

When the evidence is viewed as mandated by *Jackson v. Virginia*, *supra*, the defendant's hypothesis that Mr. Farrar was driving the vehicle is remote and unreasonable, especially in light of the defendant's statements to the contrary. Therefore, we conclude that the evidence, when viewed in the light most favorable to the state, is legally sufficient to sustain the defendant's conviction of vehicular homicide.

ASSIGNMENT OF ERROR NO. 2

Defendant, in his second assignment of error, argues that in the event that this court finds that defendant was the driver of the vehicle, the vehicular homicide statute, as applied to the defendant, is unconstitutional as the zone of protection afforded by the statute was extended to cover a class of victims not intended nor envisioned by the legislature. He argues that the defendant was denied both due process and equal protection of the law because the criminal defendant in the context of a vehicular homicide prosecution is afforded a lesser degree of constitutional and procedural protection than a defendant in ordinary civil litigation. Specifically, he asserts that the statute in question does not allow for consideration of other pertinent factors such as the conduct of the victim. The fact that the victim voluntarily entered the car with a drunk driver and was also found to be intoxicated is a fact which he claims should be taken into account before criminality should attach.

Appellant cites *State v. Taylor*, 463 So.2d 1274 (La. 1985), in support of this argument. We find *Taylor* to be inappposite to this situation. *Taylor* specifically dealt with the question of whether or not LSA-R.S. 14:32.1A (2)* created an unconstitutional presumption of guilt.

Defendant, however, correctly quotes *Taylor* for the proposition that "the evident purpose of the vehicular homicide statute is to curb traffic fatalities caused by the consumption of alcohol." *State v. Taylor, supra*, at page 1275. The statute itself provides that vehicular homicide is the killing of a human being caused approximately or caused directly by an offender engaged in the operation of a vehicle when his blood alcohol concentration is .10 percent or more.

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* LSA-R.S. 14:32.1A(2) reads as follows:

(2) The offender's blood alcohol concentration is 0.10 percent or more by weight based upon grams of alcohol per one hundred cubic centimeters of blood.

A strict reading of the article leads us to conclude that the facts of the present case fall squarely within its provisions, even though the victim was intoxicated. The legislature has chosen to include within the statute the language suggesting that the killing of *any* human being under certain circumstances constitutes vehicular homicide. While we have found no jurisprudence addressing the specific issue, we note that no exceptions or provisions to the contrary have been included in the article.

Also, the Louisiana Criminal Code provides that criminal provisions do not affect civil remedies. LSA-R.S. 14:6. It follows, therefore, that criminal proceedings and civil proceedings and the theories underlying both areas of the law are separate and distinct. Assuming arguendo that the duty/risk analysis employed in Louisiana civil liability would prevent recovery by this decedent, the defendant is still not protected from criminal culpability.

Accordingly, we find that the vehicular homicide statute includes the actions of defendant in the instant case. Furthermore, we reject defendant's assertions that there has been an unconstitutional extension of the statute to a class of victims not intended to be included by the legislature. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 3

Defendant's final assignment of error alleges an unconstitutionally excessive and disproportionate sentence in light of the particular circumstances of the instant case.

The test imposed by the reviewing court in determining the excessiveness of the sentence is two-pronged. First, the record must show that the trial court took cognizance of the criteria set forth in LSA-C.CrP. Art. 894.1. The trial judge is not required to list every aggravating or mitigating circumstance so long as the record reflects

that he adequately considered the guidelines of the article. *State v. Nelson*, 449 So.2d 161 (La.App. 4th Cir.1984); *State v. Hammonds*, 434 So.2d 452 (La.App. 2d Cir. 1983), writ denied 439 So.2d 1074 (La.1983). The articulation of the factual basis for a sentence is the goal of LSA-C.Cr.P. Art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed, remand is unnecessary even where there has not been full compliance with Louisiana Code of Criminal Procedure Art. 894.1. *State v. Lanclos*, 419 So.2d 475 (La. 1982). The important elements which must be considered are the defendant's personal history (age, family ties, marital status, health, employment record), prior criminal record, seriousness of the offense and the likelihood of rehabilitation. *State v. McGhee*, 469 So.2d 1051 (La. App. 2d Cir.1985).

Secondly, the reviewing court must then determine whether the sentence imposed is too severe given the circumstances of the case and the background of the defendant. A sentence violates LSA-Const. Art. 1, § 20 (1974) if it is grossly out of proportion to the seriousness of the offense or nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it is so disproportionate as to shock the sense of justice. *State v. Lewis*, 430 So.2d 1286 (La.App. 1st Cir.1983), writ denied 435 So.2d 433 (La.1983). The trial judge has wide discretion in the imposition of a sentence within the statutory limits and such a sentence should not be set aside as excessive absent a manifest abuse of discretion. *State v. Nelson, supra; State v. Hammonds, supra.*

In selecting a proper sentence, a trial judge is not limited to considering only a defendant's prior convictions and may properly review all prior criminal activity.

State v. Palmer, 448 So.2d 765 (La.App. 2d Cir.1984), writ denied 452 So.2d 695 (La.1984).

Appellant does not contend that the trial court failed to articulate LSA-C.Cr.P. Art. 894.1 guidelines. Appellant, however, excepts to the weight that the trial judge afforded to certain factors. He first of all asserts that the trial judge failed to consider certain mitigating factors, namely, the conduct of Mr. Farrar which contributed to the resulting injury. He argues that the trial judge was in error in determining that defendant resisted compensation as he denies liability in a parallel civil suit. He next asserts that the trial court failed to give sufficient weight to the fact that defendant has changed his lifestyle and has obviously reformed, and failed to sufficiently consider the fact that the imprisonment of the defendant would entail excessive hardship on himself and his dependents. Lastly, he notes that all of these factors taken into consideration lead to the conclusion that the trial court was in error in failing to consider an alternate sentence without hard labor in view of the circumstances.

We agree, as the trial judge noted, that if the victim had not been out drinking with the defendant, his death would not have resulted. However, we are unconvinced by defendant's argument that the conduct of the victim should serve to excuse the actions of defendant and therefore preclude his exposure to a jail term. He has been found guilty of vehicular homicide, a serious offense, and his actions are not mitigated by the condition of the victim at the time of the accident. It seems to us that the conduct which resulted in the accident—two dangerously intoxicated friends taking to the state highways in fun and frolic—is just the sort of conduct the statute seeks to deter.

Relevant to defendant's arguments relating to compensation of the victim, we agree with defendant's argument that he has a right to defend himself in a civil lawsuit

and that compensation encompassed by LSA-C.Cr.P. Art. 894.1 is defined more in the nature of reparation. We nevertheless do not find that defendant has been prejudiced by this consideration. Clearly, reparation would be difficult in this case as the life of a human being has been taken. Therefore, the trial judge's conclusion is a valid one. Moreover, we do not view this factor as being a major determinative factor in defendant's sentence. Therefore, in light of the other considerations taken into account by the trial judge, as well as the facts of the case, we find no merit to this contention.

Finally, we consider counsel's assertions that the trial court failed to consider certain mitigating factors—specifically, whether the defendant would commit another crime, as well as the hardship incurred by defendant's family. The record leads us to conclude otherwise. The trial judge specifically addressed the issue of recurrence of the event and noted that in his opinion the incident may in fact happen again should the defendant return to his old ways. He noted the reformation that had taken place in defendant's life and extensively reviewed the defendant's financial conditions and familial obligations. The trial court clearly balanced these factors against the aggravating nature of the offense and sentenced the defendant accordingly, a sentence we might add that is only six months greater than the minimum term mandated under LSA-R.S. 14:32.1.

Finally, although a suspended sentence is not prohibited under LSA-R.S. 14:32.1, based upon the extensive record of defendant which includes previous DWI offenses and traffic violations, we find that the trial court's assessment is supported by the record. We therefore conclude that the sentence imposed is not grossly out of proportion to the severity of the offense and the sentence is not excessive. The defendant's conviction and sentence are affirmed.

AFFIRMED.

ON APPLICATION FOR REHEARING

Before FRED W. JONES, SEXTON, LINDSAY, NORRIS and HALL, JJ.

Rehearing Denied.